IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1034 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PRITIBEN DEVANDRAKUMAR ACHARYA

Versus

STATE OF GUJARAT

Appearance:

MS SEJAL K MANDAVIA for Petitioner

MR RC KODEKAR for Respondent No. 1

MR HN JHALA for Respondent No. 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 22/03/2001

ORAL JUDGEMENT

#. This petition is preferred by petitioner under Article 226 of the Constitution of India and prayer has

been made therein for transfer of criminal case No.1384/97 from the court of Judicial Magistrate, First Class, Ahmedabad, to the court of Judicial Magistrate, First Class, Anand, in the interest of justice.

#. The facts of the case are that the petitioner and respondent No.2 are the wife and husband. Their marriage was solemnized on 10th May 1996. The respondent No.2 started giving physical as well as mental torture to the petitioner and he also deserted her. On 8th March, 1997, between the parties, a compromise was arrived at. However, the respondent No.2 started torturing the petitioner. Not only the petitioner's husband, but her mother-in-law and father-in-law also tortured her. Not only this, the petitioner was not given her ornaments as well as other STRIDHAN. She filed a complaint at Ghatlodia Police Station being C.R. No.I-01101/97. After investigation, chargesheet has been submitted in the court of Judicial Magistrate, First Class, Ahmedabad. More than fifteen adjournments were given. Everytime, the petitioner came to the court at Ahmedabad with local advocate but the matter was adjourned. It is further stated that she has to bear heavy expenses of travelling of herself as well as witnesses and family members. An application has also been given by petitioner to complete the evidence but that has not been completed. It is stated in paragraph-5 of the special criminal application that to harass her, the respondent No.2 is filing applications for adjournment for last two years. On each and every date, she is objecting for giving adjournment but adjournments are being granted as said earlier. It is the modus operandi of respondent No.2 to prolong the case by getting adjournments.

#. The learned counsel for the petitioner submitted that the petitioner being a lady, is not in a position to come alone at Ahmedabad from Dakor and she has to spend huge amount in travelling and other expenses to attend the case at Ahmedabad. Further, what she contended that we are talking of providing doorstep courts but here in this case, the petitioner has to come from Dakor and otherwise also, for the last two years, the matter is being adjourned and she is suffering a lot. She will have difficult to bring her evidence at Ahmedabad. It is submitted that though in the prayer clause, prayer has been made for transfer of the case to Anand, the petitioner submits that it may be transferred to Dakor where also court of Judicial Magistrate is there.

#. Shri Jhala, learned counsel for respondent No.2 on the other hand submitted that there are in all nine

accused in criminal case and it will be a serious injustice to them in case the matter is transferred to Dakor from Ahmedabad. It has next been contended that in the matter of transfer of a criminal case, the court has to consider the convenience of both the parties to the litigation. Next, he contended that all the accused are Government servants and to attend the case at Dakor or Anand, they will have to take leave. Lastly, it is contended that if this court orders for transfer of this criminal case either to Anand or Dakor, the accused other than the husband be granted exemption from personal appearance in the court.

#. The matter is contested by respondent No.2 on merits but if ultimately if the court accepts the prayer of the petitioner, there is no objection from the side of respondent No.2 for transfer of the case to Dakor though it is prayed for transfer of the same to Anand.

#. This petition under Article 226 of the Constitution of India is difficult to appreciate by the petitioner. The petition under Article 226 of the Constitution may not be the remedy available where the litigant has efficacious remedy available. Under Section 407 of the Code of Criminal Procedure, 1971, this court has power to transfer the case and in view of this specific provision, this petition under Article 226 of the Constitution is difficult to appreciate. However, when the power vests with the court to transfer a criminal case from one place to another, this non mentioning of the provision will not defeat this prayer made by petitioner for transfer of criminal case.

#. Section 407 of the Code of Criminal Procedure, 1973, provides that whenever it is made to appear to this Court that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or that some question of law of unusual difficulty is likely to arise or that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order for transfer of a case from the criminal court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction. Sub section 2 of Section 407 of the Code lays down that this court may act either on the report of the lower court or on the application of a party interested, or on its own initiative. From perusal of the provisions of Section 407 of the Code, I am satisfied that this court has power to transfer the criminal case from the criminal court subordinate to its authority to

any other such criminal court of equal or superior jurisdiction as enumerated in this section. This transfer of a criminal case from one criminal court subordinate to its authority to another criminal court of equal or superior jurisdiction can be either on the report of the lower court or on the application or a party interested or on its own initiative. Clause (c) of Sub-section 1 of Section 407 of the Code gives power to this court to transfer criminal case from one criminal court subordinate to any other such criminal court of equal or superior jurisdiction which will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice. In the case in hand, I find that it is a case where the petitioner has to produce the evidence and naturally most of the witnesses will be from Dakor and in case they are produced at Ahmedabad, it may not be convenient to them. Moreover, in the facts of this case where the only contribution of the respondent No.2 is to get the matter adjourned from time to time, lightly the matter appears to have been adjourned by the court, and it will and certainly it would have been resulted in causing serious inconvenience as well as hardship to the petitioner. She has to come to Ahmedabad with her relation and sometime to also bring witnesses and if only result is adjournment of the matter on the application of respondent No.2, it is certainly a cruelty to her. In such matters, the court has to take all the care to see that unnecessarily the litigants are not put to inconvenience or hardship while considering the application filed by the other side for adjournment of the matter. Otherwise also, in clause (c) of sub-section 1 of Section 407 of the Code, this court has power to order for transfer of a criminal case from the criminal court subordinate to its authority to any other such criminal court of equal or superior jurisdiction where it is expedient for the ends of justice. Under this clause, much wider power vests in the court and in the interest of justice, this court can order for transfer of this case from Ahmedabad to Dakor. It is true that some inconvenience may be there to the accused to attend the court at Dakor but it is equally inconvenient to the petitioner to attend the case at Ahmedabad. It is hardly relevant that there are nine accused. Accused are to attend the court unless they are exempted from personal appearance on all the dates. Here, in this case, the petitioner is regularly attending the case in the criminal court at Ahmedabad but it was adjourned from time to time and it resulted in causing inconvenience to the petitioner, both physically as well as financially, leaving apart other troubles to which she would have been subjected. Normal life of litigation in

the courts is long and she may have to come to Ahmedabad to attend the case on many more dates. If we go by realities and inconvenience to be caused to the respective litigants in the case, certainly the balance tilts in favour of the petitioner. The petitioner, being a lady, she may have so many difficulties in attending the court at Ahmedabad. The way in which the proceedings of the case are going on in the court at Ahmedabad, she may be subjected to much more inconvenience and troubles. Her witnesses may also be subjected to inconvenience and troubles and if we go by comparison, certainly the petitieonr is in disadvantageous position if the matter is continued at Ahmedabad. The accused may be Government servants and it is hardly any consideration to deny this prayer to the petitioner.

#. So far as the contention raised that this court may give direction to the transferee court for exemption from personal appearance of the other accused, it is suffice to say that this is a matter for which the accused have all the right to make an application before the concerned judicial magistrate and if such an application is filed, he will decide the same in accordance with law. This court, sitting under Article 226 of the Constitution of India or Section 407 of the Code, cannot grant exemption to the other accused from personal appearance in the court at Dakor. This does vest with the Judicial Magistrate, First Class, and for which the accused have to submit an application and as and when such an application is filed, the court will decide the same in accordance with law.

#. In the facts of the case, I am satisfied that it is a fit case where relief as prayed for to transfer the Criminal Case No.1384/97 from the court of Judicial Magistrate, First Class, Ahmedabad, to the court of Judicial Magistrate, First Class, Dakor, deserves acceptance. In the result, this petition succeeds and the same is allowed and the Criminal Case No.1384/97 is ordered to be transferred from the court of Judicial Magistrate, First Class, Ahmedabad, to the court of Judicial Magistrate, First Class, Dakor. Rule is made absolute in the terms aforesaid. In the facts of the case, the parties are left to bear their own costs. Otherwise also, the petitioner being a lady, is entitled for free legal services and still instead of availing of that benefit available, she has chosen to engage an advocate and as such I do not consider it to be a fit case where costs have to be awarded.

##. Before parting with the judgment, I consider it to

be necessary to inform to the petitioner by this judgment that she is entitled for free legal services in the court. From the facts, though not very clearly stated in the petition, I find that the petitioner is not in employment or doing her own business or work. From paragraph-4 of the petition, I find that either on his own or under the court's order, the husband is to pay the amount of maintenance regularly to the petitioner but he is not paying the amount of maintenance regularly. From the words used in this paragraph it is more plausible to draw inference that the husband is to pay maintenance to the wife, the petitioner herein, under the court's order. From paragraph-5 of the petition, I find that the petitioner, for the last two years, is regularly coming from Dakor to Ahmedabad along with her family members and the advocate. It is further stated that the petitioner is having weak financial condition. It is stated that she has to incur heavy financial expenses of coming to Ahmedabad herself with family members, witnesses and the advocate from Dakor. It is a fact stated by the petitioner and the same is to be taken to be correct. Looking to the financial condition of the petitioner, I am satisfied that she is not in a position to bear out the heavy expenses of travelling from Dakor to Ahmedabad and above that, the expenses of advocate which she brings from Dakor. Naturally, when the advocate is coming to Ahmedabad from Dakor, he can reasonably charge his fees for this work at Ahmedabad. Though the petitioner has a legal right of free legal services, she has engaged an advocate, meaning thereby, has not exercised this right. Therefrom, only inference follows that she is not aware of her this legal right. It is unfortunate that this lady is subjected to this heavy expenses of litigation though otherwise she has a legal right of free legal services. Now this matter is transferred to Dakor by the court so that she may not bear these expenses of travelling herself, her family members and advocate from Dakor to Ahmedabad. But the case will take its own time and she needs the services of advocate. I consider it to be appropriate to bring to her notice her legal right of free legal services and if she desires of taking benefit of this right, she can apply to the concerned legal services committee at Dakor and in case such an application is filed, certainly, she has to be given this free legal services. It is equally duty of the advocates as well as the Bench to bring to the notice of this class of litigants of their this legal right. This probably has not been done, otherwise, there is all the possibility that the petitioner would have been provided the free legal services at Ahmedabad and she would not have borne these heavy expenses of travelling, boarding

as well as fees of the local advocate which she on each and every day takes from Dakor to Ahmedabad. The registry is directed to send this message along with the judgment to the petitioner in vernacular so that she may read and understand the same.

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(sunil)